

Recent Amendments to the New Jersey Business Corporation Act

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On January 16, 2018, in one of his final acts as Governor, Chris Christie signed into law several pieces of legislation related to the New Jersey Business Corporation Act (NJBCA), including those summarized below:

P.L. 2017, c. 356: Provides that by-laws may include a forum selection clause and clarifies the permissible scope of by-laws.

This law amends the NJBCA to permit corporations to include in their by-laws a provision (commonly referred to as a “forum selection clause”) stating that the federal and state courts in New Jersey shall be the exclusive forum for certain shareholder actions involving the corporation, including derivative actions brought by shareholders on behalf of the corporation. The amendments permit New Jersey corporations to adopt such a forum selection clause with respect to any action brought by one or more shareholders involving the internal affairs of the corporation, including (i) derivative actions, (ii) actions alleging breach of a fiduciary duty owed to the corporation or the shareholders, (iii) actions arising under the certificate of incorporation or the NJBCA, (iv) any other shareholder claim arising under New Jersey law, and (v) any other claim governed by the internal affairs doctrine (or an analogous doctrine). The amendments also clarify that a corporation’s by-laws may contain any provision, not inconsistent with law or its certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights and powers and the rights and powers of its shareholders, directors, officers, or employees.

P.L. 2017, c. 363: Clarifies that directors may approve board action without a meeting by electronic transmission.

This law expands the written consent provisions applicable to directors to include consent by electronic transmission. This amendment represents a modernization of the NJBCA in recognition of technological evolution and makes clear that a director may effectively grant his or her consent to board action via email, facsimile, and other means of electronic transmission. Under the NJBCA, “electronic transmission” means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient and that may be directly reproduced in paper form by that recipient through an automated process.

P.L. 2017, c. 299, s. 1: Allows by-laws to set forth provisions governing director nominations by shareholders and inclusion of materials related to shareholder nominees in proxy solicitation materials.

This law adds a new section to the NJBCA, section 14A:5-31, which provides that a corporation's by-laws may establish procedures or conditions under which materials with respect to shareholder-nominated individuals will be included in a corporation's proxy solicitation materials for an upcoming election of directors. Such procedures or conditions may include, without limitation, the following:

- (1) Requirement of a minimum level of beneficial share ownership and/or a minimum duration of ownership of such shares with respect to a nominating shareholder;
- (2) Limitations regarding nominations of directors who have previously been nominated to the board;
- (3) A cap on the potential number of shareholder-nominated director candidates with respect to any election;
- (4) Requirements relating to information to be submitted concerning the shareholder and the shareholder's nominee, including information concerning stock ownership;
- (5) A provision limiting nominations to shareholders who have not, and whose nominee has not, within a specified time period, indicated an intent to acquire shares constituting a specified percentage of the voting power of the corporation's outstanding voting stock; and
- (6) Provisions requiring that a nominating shareholder indemnify the corporation for any loss resulting from any false or misleading information submitted by such person in connection with a nomination.

If you have questions concerning the impact of these legislative reforms on your business, please contact the author of this Alert, **David Heeb**.